THE CLASSIFICATION OF PUBLIC REVENUES.

AMONG the unsettled questions of the science of finance one of the most troublesome is that of classifying the different kinds of public income. Classification is indeed not of supreme importance: matter is always more essential than form. But correct classification is helpful in many ways. It requires logical criticism and rigorous analysis, and thus becomes a test of mental vigor. It conduces to accurate definition and prevents looseness of expression and confusion of thought. It may have important practical results in deciding questions of fact and in assigning definite values to doubtful categories. It points out contrasts and resemblances, and by eliminating or combining what is common often suggests a clearer conception of the subject-matter. Correct classification is, in truth, an essential condition of all scientific progress.

It has frequently been remarked that we must distinguish between historical and actual classifications. The whole class of lucrative prerogatives — the *Regalia* of the Teutonic kingdoms and of early fiscal science — were separated from the other categories of public revenues because of their commanding importance in all mediæval countries and their supposed points of difference: whereas well-nigh every recent writer of importance, even in Germany, has confessed that all of these prerogative revenues are capable of being classified under one of the other modern categories. So, again, the revenue from the incidents of feudal tenure played a great rôle in the classification of Blackstone and other early writers. The need of showing the composite nature of such revenues has been obviated by the disappearance of the tenures themselves. Finally, special assessments are a growth of comparatively recent

times. A classification of public revenues made some time ago might have safely ignored their existence; a logical classification of actual revenues would be incomplete without them. What concerns us here is a classification applicable to modern conditions.

I.

From the standpoint of the individual all contributions to government are either gratuitous, contractual, or compulsory. Every governmental revenue must fall within one of these three great classes. Individuals may make the government a free gift, they may agree or contract to pay, or they may be compelled to pay. The first method of securing revenue was at one time important, but its influence is slight to-day. The second and third methods correspond to the classification suggested by Adam Smith,* which has been widely adopted. Adam Smith says,—

> The revenue which must defray . . . the necessary expenses of government may be drawn either, first, from some fund which peculiarly belongs to the sovereign or commonwealth, and which is independent of the revenue of the people, or, secondly, from the revenue of the people.

That is, the government may act as a private individual would, possess lands or other revenue-yielding property, and engage in mercantile, financial, or industrial pursuits. As Petty, the author of the first systematic English treatise on taxation, put it in the seventeenth century, the state is in some places the common cashier, the common usurer, the common insurer, or the common beggar.† This is what the French call in the widest sense the rev-

* *Wealth of Nations*, Book V. chap. ii.

† William Petty, *A Treatise of Taxes and Contributions*, London, 1667, pp. 60, 61.

enue from the private and industrial domain of the state, and what the Germans term the private-economic income, I would suggest the term contractual income; for the government here puts itself in the position of a private person making a contract with another person. The payments all rest on an agreement between the two contracting parties, in sharp contrast to the payments which the government demands by virtue of the sovereign powers delegated to it.

We often hear of the distinction between voluntary and compulsory contributions, meaning by the former term the free gifts of the citizens. This distinction is not perfectly accurate. Contractual contributions are also voluntary, without being free gifts. In the case of the contract, the government agrees to do some particular thing in return. It leases the land, for instance, in return for the rent. In the case of the free gift, neither does the government undertake nor does the donor expect any specific action in return. And yet both payments are voluntary. We must hence distinguish not merely between voluntary and compulsory contributions, but between gratuitous, contractual, and compulsory contributions.

Thus far almost all writers are agreed. The difficulty arises when we desire to classify the various kinds of compulsory revenues and to draw the line between some of these subdivisions and the various kinds of contractual revenues. All possible combinations have been made, especially by recent German writers. I shall confine myself in this article to the pith of the controversy; *i.e.*, the subdivision of the compulsory contributions and the relation between some of the compulsory and the contractual revenues as, for instance, the charges made for certain governmental enterprises, like post-office, telegraphs, and the like.

The sovereignty of the modern state manifests itself in different ways in taking the property of individuals. The

government may exercise in turn the power of eminent domain, the penal power, the police power, or the taxing power.

The power of eminent domain confers on the government the right of taking private property at its discretion, and to an indefinite extent for particular uses. With the constitutional and moral limitations upon this power we have not to deal here, chiefly because the power is for the most part not a source of net revenue. The fact that in all free governments private property cannot be taken under this power except for public use, and even then not without just compensation, would in itself show that no net income to the state is contemplated. Yet such a revenue may accrue incidentally. For the benefits accruing to the government through the expropriation may conceivably be greater than the damage inflicted on the private individual. Revenue through expropriation is thus the first class of compulsory income.

The second sovereign power of fiscal importance is the penal power, or right of inflicting fines and penalties, known technically as the power of sanction. In one sense the penal power, or power of sanction, might be declared a part of the police, or regulative, power of the state; since every government regulation must carry with it the power of enforcing the regulation. But on account of the decidedly problematic fiscal importance of the police power it seems better to separate them. The power to adjudge fines and penalties, however, while often quite important as a source of revenue, belongs rather to penology and administration than to the science of finance. For the private property is here taken not in accordance with the needs of the state or with any principles of equality or uniformity or benefits or compensation, but solely as a punishment inflicted on the individual. The only limit to the fiscal significance of this source of revenue in free countries is the very vague provision, as in

the American Constitution, that excessive fines shall not be imposed nor cruel and unusual punishments inflicted. Fines and penalties thus form a class of compulsory revenues by themselves, levied according to definite but non-fiscal principles. It is obviously wrong to class them with fees, as Professor Wagner does, or to ignore them entirely, as Professor Bastable does.

The third sovereign power of the state is the police power, or power of regulation. This power has played a great rôle in American jurisprudence. Yet I make bold to say that from the standpoint of the science of finance the distinction drawn between the police power and the taxing power is to a great extent a fiction, referable to certain difficulties in American constitutional law and to a lack of economic analysis on the part of our judges.

The commonly accepted distinction is that the police power is for regulation and the taxing power for revenue. One form of the argument is that advanced by authors like Mr. David A. Wells, who argue that a so-called tax which looks to anything besides the securing of revenue is not a tax, but an unconstitutional exercise of the taxing power. But even adherents to the distinction between the police power and the taxing power, like Judge Cooley, confess "that, in the apportionment of taxes, other considerations than those which regard the production of a revenue are admissible, and that the right of any sovereignty to look beyond the immediate purpose to the general effect cannot be disputed." * The position of Mr. Wells is the exact opposite of that of Professor Wagner, who includes in the very definition of a tax the "socio-political" element or the duty of regulating and correcting the distribution and use of private property.† The one would refuse the name "tax" to an imposition looking to anything else than mere revenue: the other ought logi-

* Cooley, *Taxation*, 2d ed., p. 587.

† Wagner, *Finanzwissenschaft*, ii. (2d ed., 1890) p. 210.

cally to withhold the name of tax from an imposition *not* looking to anything else than mere revenue. The two positions are mutually exclusive and equally extreme.

On the other hand, the distinction of Judge Cooley is almost quite as untenable. Cases where the primary purpose is regulation, he thinks, are referable to the police power; cases where the primary purpose is revenue are referable to the taxing power. This would throw the whole subject into confusion. Mr. Cooley himself confesses that import duties with incidental protection are taxes. But suppose, as has often occurred, that they are protective duties with incidental revenue. Are they any the less taxes on that account? How about the tax on bachelors, which was imposed for the express purpose of diminishing celibacy? How about our ten per cent. tax on State bank notes, imposed avowedly to destroy the State bank issues? How about the American tax on oleomargarine, confessedly of a regulative nature? How about taxes on spirituous liquors in the shape of liquor licenses, to regulate and diminish the liquor traffic? How about the mass of indirect taxes enacted in consequence of sumptuary laws to check extravagant consumption? How about certain inheritance taxes, whose imposition is demanded on the express ground that they will limit fortunes? How about Henry George's single tax, whose only *raison d'être* is the attempt to change the existing distribution of wealth? Shall we call the Indian duty on opium a tax, and refuse the name to the American internal revenue opium charge, because India looks primarily to revenue, and the United States to regulation? Shall we call the French *impôt des patentes* a tax, and deny the name to the analogous license or privilege taxes in some of our Southern commonwealths, because in the latter case the object is sometimes distinctively regulative? In fact, if this is to be our line of cleavage, we must at once reconstruct the science of finance and remove from the class of

taxes whole categories of impositions to which no one has ever thought of denying the character or appellation of tax.

The confusion in the American law is at once complimentary and uncomplimentary to the judiciary. It is complimentary in the sense that our judges, when brought face to face with the conflict between constitutional limitations and the demands of social evolution (or what is known in legal parlance as public policy), have sought to remain true to their function as the final interpreters of social progress. But this they have been able to do only through legal fictions and divergent decisions. Any one who has studied the American law of taxation as a whole must have become painfully conscious of the hopeless contradictions among the various States on many important points. This is due in great measure to the fact that the constitution or laws of one State by implication forbid what the constitution or laws of another State expressly permit. In order to take an actual case, which is perhaps in line with public policy, out of the range of the legal inhibition, the courts of the first State are forced to adopt an interpretation wholly unnecessary in the second State. Thus the continuity of social development is preserved, even at the sacrifice of legal consistency or uniformity. For instance, to take only a few cases from the particular topic here under discussion, in New York street-car licenses are held to fall under the taxing power, while in Pennsylvania they are put under the police power, simply because in the particular cases involved it seemed to be a matter of equity to uphold or object to the imposition in question.* The payment was the same, both in fact and from the standpoint of public finance,—$50 in each case; but the attempt to make conflicting laws conform to a divergent public policy has brought about a contradiction. So

* *Cf.* 2d Avenue Railroad Cases, 32 N. Y. 261, with R.R. Co. *v.* Philadelphia, 58 Pa. 119. What was held "reasonable" in one case was declared "unreasonable" in the other.

the whole system of high license or liquor taxes is in some States brought under the taxing power; but in other States, because of certain constitutional difficulties, it is put under the police power.* The police power has been to this extent a legal fiction to enable the court to uphold what could not well be brought under the taxing power, while conversely in the leading case of Youngblood *v.* Sexton † the liquor tax was upheld under the taxing power because there was a constitutional obstacle to its being put under the licensing or police power. The police power is of legal importance in the United States largely because of the peculiar principles of American governmental relations, whereby the local bodies are deemed to have only those powers expressly delegated to them, in contradistinction to the European continental method where local bodies possess, in certain respects, all powers not expressly withheld from them.‡ Many of our cities and towns had no taxing power; and even when they have the taxing power, it is strictly construed. The courts have been compelled to uphold much under the police power that under other and more favorable conditions they would and could uphold under the taxing power.

On the other hand, there is an element which is not quite so complimentary to our judges. The courts have frequently confused taxes in the narrower sense with the exercise of the taxing power in the wider sense. As we shall see, there are various ways in which the taxing power may manifest itself: taxes in the narrower sense are only one form. Special assessments have been almost universally upheld as an exercise of the taxing power, and yet sharply distinguished from taxes in the narrower sense. Yet in a leading case sidewalk assessments have been de-

* Burch *v.* Savannah, 42 Ga. 596. *Cf.* 50 Texas, 86. † 32 Mich. 406.

‡ Goodnow, "Powers of Municipalities respecting Public Works," *Publications of the American Economic Association*, ii. pp. 72–79. Professor Goodnow terms these the systems of legislative and of administrative control respectively.

clared police regulations,* although as a matter of principle they do not differ in any respect from other special assessments upheld under the taxing power. The court has simply confused taxes with the taxing power. It is utterly impossible to see any difference between the various cases of sewer and levee assessments quoted by Mr. Cooley as an exercise of the police power and the cases of sewer and levee assessments quoted by him in another chapter as falling under the taxing power.† The whole distinction rests upon a confusion. So, again, in the case of license fees. Both taxes and fees are an exercise of the taxing power. Yet because it has frequently been deemed necessary to uphold license fees by distinguishing them from taxes, many of our courts have declared license fees not an exercise of the taxing power at all, but of the police power, thus confusing taxes with the taxing power. There is a decided line of difference, as we shall see, between a license fee and a tax; but it is not the line drawn by our courts. It is this groping after the real distinction between fees and taxes, as explained below,‡ which has led our judges, not trained in economics, to draw the line between payments under the police power and payments under the taxing power. The distinction between fees and taxes is not synonymous with the distinction between the police power and the taxing power; for there are many classes of fees, like court fees, fees for legal documents, school fees, etc., which cannot possibly be put under the police power.

While, then, it may be true that from the legal point of view it is expedient to distinguish between the police power and the taxing power, to say that the one is for regulation and the other for revenue; and while the constitutional importance of the police power, especially in the United

* Godard, Petitioner, 16 Pick. 504, 509, quoted by Cooley, *Taxation*, p. 589.

† Cooley, *Taxation*, pp. 588–591, compared with pp. 616–620.

‡ See below, p. 305.

States, is in many respects considerable,—yet from the economic and fiscal standpoint the distinction is wholly unnecessary. A tax is no less a tax because its purpose is regulation or destruction; and a fee or payment for regulation brings in just as much revenue as a precisely identical fee imposed primarily for revenue. The test from the standpoint of finance is not whether the payment is for regulation, but, as we shall see, whether the payment is large or small, or whether the payment is primarily or special benefit or for common benefit; that is, it is a distinction not between police power and taxing power, but between fees and taxes. Payments that are legally put under the police power are scientifically to be classed under the taxing power.

II.

We come finally to what is from the fiscal standpoint the chief sovereign power of the State,—the taxing power. The taxing power may manifest itself in three different forms, known respectively as special assessments, fees, and taxes. These three forms are all species of taxation in the wider sense, in so far as they differ on the one hand from contractual revenue or *quasi*-private income, and on the other hand from the other great divisions of compulsory revenue, like expropriation and fines. What is common to all three is that they are compulsory contributions levied for the support of government or to defray the expenses incurred for public purposes. That is the essence of the taxing power. But, although they are all forms of taxation in this wider sense, yet the difference between fees and special assessments on the one hand, and taxes in the narrower sense on the other hand, are so marked that they must be put in separate categories. Let us study their characteristics, taking up first those payments, like fees, tolls, costs, and charges, which may be summed up under

the general head of fees (the German *Gebühren*, the French *taxes*, the Italian *tasse*.)

The distinction between fees and taxes, although sometimes ascribed to Rau, is really much older. Adam Smith already speaks of certain expenses "which are laid out for the benefit of the whole society." "It is reasonable, therefore," he adds, "that they should be defrayed by the general contribution of the whole society, all the different members contributing as nearly as possible in proportion to their respective abilities." These, as he afterward explains, are taxes. On the other hand, he speaks of certain outlays, as for justice, for "persons who give occasion to this expense," and "who are most immediately benefited by this expense." The expenditures, therefore, he thinks, "may very properly be defrayed by the particular contributions of these persons"; that is, by fees of court. And he extends this principle to tolls of roads and various other expenses.* The "particular contributions" of Adam Smith, in contradistinction to the general contributions, are nothing but fees in contradistinction to taxes. In fact, we find the distinction already in Justi, several decades before Adam Smith. Justi, however, like the other Germans of his time, looked upon the *Regalia*, or lucrative prerogatives, as a separate class, and hence classified public revenues into (1) Domains, (2) Regalia, (3) Taxes, and (4) Casual Revenues, including prices and payments for special privileges.† Later on Rau gave these latter payments the name of *Gebühren*, or fees; but the essence of the distinction is to be found in Justi, and still more clearly in Adam Smith.

A fee, then, is a manifestation of the taxing power. It is a compulsory contribution for a service in which the element of public purpose must be present. But it differs from a tax in several important points.

* *Wealth of Nations*, Book V. chap. i., Part IV. (vol. ii. p. 402 of Thorold Rogers's edition). Compare Book V. chap. i., Part II. and III. *passim*.

† Justi, *Staatswirthschaft*, 2d ed., 1758, ii. pp. 95, 400–429.

First, a tax is levied as a part of a common burden: a fee is assessed as a payment for a special privilege. The basis of taxation is the ability or the faculty of the taxpayer. The basis of a fee is the special benefit accruing to the individual. In the case of a tax, it is true the ability or faculty may be influenced to a certain extent by the opportunities or privileges or benefits received. But the difference is the test. In the case of a fee, the benefit is measurable: in the case of a tax, the benefit is not susceptible of direct measurement. In the case of a fee, the particular advantage is the very reason of the payment: in the case of a tax, the particular advantage, if it exists at all, is simply an incidental result of the state action.

The question of special benefit was, it is true, originally of minor importance. The mediæval monarch exacted in the shape of fees and charges pretty much what he chose, disguising numberless exactions under the mask of payments for special privileges. But even there it may be said, not that the idea of benefit was absent, but that the monarch made himself the arbitrary judge of the benefits. That his despotic estimate often resulted in hardship does not alter the theory. Gradually, however, the idea of actual benefit came to the foreground, until it has finally become the controlling factor.

The real distinction between a fee and a tax in modern times can readily be grasped by taking those taxes which are in the greatest danger of being confounded with fees. Let us compare the various modes of paying for the use of the water supply in municipal life. In England the expenses are defrayed by the local water tax, known as the water rate. In other places, like New York City for example, the expenses are defrayed by a special water fee, which is popularly known, indeed, as the "water tax" (although its legal name is "water rate" or "water rent"), but which is none the less a fee. That is to say, in England the rate, or tax, is assessed on the general

basis of local taxation, which there happens to be the rent of real estate, but which in other countries might be property or income or any other recognized basis: in New York the fee (or so-called rate) is assessed not on the basis of the general property tax, but according to the consumption of water, as fixed either directly by water meters or approximately by the number and capacity of bath-rooms, closets, hose, machines, etc. In the case of the tax, the individual pays, whether he uses much or little: in the case of the fee, he pays only according to the special benefit (either actual or presumptive) which he derives. The test in England is the general obligation to contribute to local rates: the test in New York is the particular advantage derived from the local service or deemed to be derived therefrom, and hence arbitrarily fixed. The contrast could not be greater. We must not confound special taxes with fees.

An adequate discussion of the distinction between a general tax and a special tax belongs to the question of the sub-classification of taxes in particular, and would lead us too far astray here. But we can say at all events this: a general tax, like the ordinary State or local tax in America, is not levied for any definite, particular expenditure, but is assessed for general governmental purposes; a special tax, like the English local rates or the local taxes in some American States, like New Jersey,* is assessed for the accomplishment of some special task to which the government is pledged, and is levied on a definite section of the population.† The water rate, the sewer rate, the poor rate, the lighting rate, etc., are each levied for the special purpose and on the definite class of taxables subject to the rate. But this special tax is none the less a

*Compare *Comptroller's Report* of the State of New Jersey for 1891, financial condition of counties, etc., pp. 1–87.

† These taxes must of course not be confounded with the so-called "special taxes" in some of our Southern commonwealths, which are known as license or privilege or business taxes in the other commonwealths.

veritable tax: it is levied for a public purpose, it is assessed on what is deemed to be the faculty or "means" of the tax-payer; and there are no particular benefits accruing to him as an individual. Even if he does perchance derive a benefit, it is not a special, measurable, individual benefit apart from the common benefit that the other members of the class derive. It is simply an incidental result of his share in the common benefit. In the fee, on the other hand, the special individual benefit is distinctly measurable and forms the basis of the assessment, although it may be a presumptive, and not necessarily an actual, benefit. Thus, while a special tax differs in some points from a general tax, it differs in far more important points from a fee.*

A second distinction between fees and taxes is that a fee does not normally exceed the cost of the particular service to the individual. This, however, although commonly much made of, is of subordinate importance. For, in the first place, it can obviously apply only to those fees paid in return for some positive work done by government. The government, indeed, must always give something in return for a fee; but in many cases it may give only a permission to do something,— a permission which costs almost nothing, and for which a considerable fee may be exacted. The controlling consideration here is not cost, but measurable special benefit. Historically, we

* Professor Bastable, *Public Finance*, p. 364, errs in stating that the English local "rates" are "measured for each payer by the benefit of the service," and that "local taxation should be in proportion to advantage." That is precisely the distinction between local or special taxes, on the one hand, and fees or special assessments, on the other. English local rates are not levied according to particular advantage. See the official authority quoted below, p. 315. *Cf.* also the leading English case of Rex *v.* Mast, 6 T. R. 154, which decides that the sewers' rate, etc., is assessed on the same basis as the poor rate, the principle of which is that "each inhabitant should contribute according to his ability, which is to be ascertained by his possessions in the parish." See also Boyle and Davis, *The Principles of Rating*, p. 99. The fact that personal property has been excepted by statute from liability for local rates does not change the principle.

know that these special charges were made entirely irrespective of cost.* But, even in the case of a positive action by the government, cost is simply another method of measuring the special benefit.† This has been entirely overlooked by all writers, but is none the less true. In all competitive private enterprises the benefit to the individual is the cost. That is, the amount which the individual is willing to pay — and he is the best judge of the benefit to be derived — is the price; and the price is fixed ultimately by the cost of production. The whole modern theory of marginal utility as the regulator of price is simply a way of putting the degree of special benefit to the individual; and the true theory of price confesses that the marginal utility in competitive enterprise resolves itself ultimately into cost of production. The benefit to the individual, therefore, is the cost. As soon, however, as we have a private monopoly, the benefit to the individual diminishes in proportion to the sacrifice he is compelled to make in paying more than the cost of production; and the excess of price over the normal benefit (as measured by cost) represents in so much a tax on the individual.

Now, the same is true of governmental action. It may, and often does, happen that the government is not actuated by motives of profit, and sells its services for cost, like a private competitor. Then special benefit to the individual and cost to the government are synonymous. But, if the government seeks to make a monopoly profit, and charge more than cost, then as before the special benefit to the individual may be said relatively to diminish, until finally the exactions become so great that the special

* Professor Brentano calls attention to this historical fact. *Cf.* Faber, *Die Entstehung des Agrarschutzes in England*, p. 58. But they both fail to notice the points made in the text.

† The cost referred to here is at once the cost to the individual and the cost to the government. They are synonymous, because the government under the supposition gives its services for cost.

benefit is merged in the special burden, and the charge becomes not a counter-payment, but a special tax. On the other hand, the government may decide to charge less than cost, or even to offer its services gratuitously, in which cases the special benefit to the individual may gradually be swallowed up in the common benefit. In such a case, the very reason of the gratuitous service is that no special benefit exists, or that it results only incidentally from general state action. Thus we see that special benefit to the individual is correlative with cost to the government. If the charge is less than cost, the special benefit is *pro tanto* converted into a common benefit, until finally there is no charge, because no special benefit. If the charge is more than cost, the special benefit is *pro tanto* converted into a special burden, until finally the charge is all tax, because it is all burden, and no special benefit (except incidentally as the result of all special taxation).

This point of view helps us out of a difficulty as to the line of cleavage between fees and taxes. Thus, if a charge is made for the cost of judicial process, the payment is a fee, because of the special benefit to the litigant. If no charge is made, the cost of the process must still be defrayed by general taxation; and the litigant pays his share in general taxes. If the charge is so arranged as to bring in a considerable net revenue to the government, the payment by the litigant is a tax,— not a general tax on all tax-payers, but a special tax on litigants, like the tax on lawsuits in some of our Southern commonwealths. But the character of fee has disappeared only secondarily because the principle of cost has been deviated from, but primarily because the special benefit to the litigant has been converted in the one case into a common benefit shared with the rest of the community, and in the other case into a special burden. The same is true of other fees. And it is the failure to grasp the basis of the distinction that has confused so many writers.

A third distinction between fees and taxes may be found in the conditions attached to the service which the government performs. It may be said that in the case of a fee the government does some particular thing in return, while in the case of a tax there is no special service. The particular thing done by government in return for a fee may be either the display of some positive energy, as in the case of the water supply, or it may be a simple permission to do something. The government may create direct utilities, or it may permit the individual to create utilities; and in each case it demands a return for the privilege. But, in the case of a tax, the government simply refrains from doing; or, if it does anything at all, it does it only in the sense of general governmental action. This distinction will apply even to so-called "special taxes," as over against "general taxes." For, even in the case of a special tax, the government does not pledge itself to do anything especial for the individual as an individual. It agrees to do some special thing for the community or for the special class involved, but it is wholly immaterial to the government whether the individual avails himself of the incidental advantage accruing to the class as a whole. Even in the case of "special taxes" we are not confronted with the principle of give and take, or *quid pro quo*, in the sense of an individual bargain.

A further distinction that has been very fruitful of confusion is that between business licenses or fees, and business taxes. The legal terms applied to the payments must not lead us astray. For instance, the identical charge levied on certain retail businesses is called in various American States a fee, a license, a license fee, a license tax, a special tax, a specific tax, a privilege tax, an occupation tax.* The same payment exacted from insurance companies is called sometimes insurance fee, insur-

*Compare Seligman, *Finance Statistics of the American Commonwealths*, 1889, pp. 88–96.

ance license, insurance license fee, insurance tax, insurance license tax. The same payment imposed on certain corporations is called variously charter fee, bonus on charters, license tax, tax on certificates, organization tax, corporation tax, and even corporate franchise tax.* The legal nomenclature in America is a most remarkable jumble.

The real distinction between a license charge and a business tax is this: the non-payment of a license charge normally renders the exercise of the business illegal, while the non-payment of a business tax does not render it illegal. Or, more broadly, it may be stated that a license charge is a condition precedent, while a business tax is a condition subsequent (or, strictly, no condition at all).

A license charge, however, may be either a license fee or a license tax.† In order to ascertain which it is, we must fall back on the preceding distinctions. When the license is imposed to cover the cost of regulation or to meet the outlay incurred for some improvement of special advantage to the business, it may be truly said that the licensee gets a special benefit from the privilege, a special benefit measured by the cost. The charge would then be a fee, as in the common case of cab licenses. When, however, the charge for the license to carry on a business, which before the imposition of the restrictive law was open to any one, is purposely so high as to bring in a distinct net revenue to government above the cost of regulation, then we can no longer properly speak of special benefits to the licensee, since, as we have already seen, the special benefit becomes converted into a special burden. The charge is then no longer a license fee, but a license tax. This would be the case with some of the so-called

* Compare Seligman, "Taxation of Corporations," *Political Science Quarterly*, vol. v. (1890) p. 305.

† This is entirely overlooked by the American legal writers. Thus Black on *Intoxicating Liquors*, § 108, makes a labored argument to distinguish taxation from license, while in reality he is distinguishing license fees on the one hand from license taxes and business taxes on the other.

license or privilege taxes in the Southern commonwealths.* Finally, if the payment is not conditional upon taking out a license, but is assessed on certain elements of the business, such as purchases, sales, capital, etc., as in the French *patentes*, the German *Gewerbesteuer*, and some of the American payments, then we have not license taxes, but business taxes, because the condition is subsequent, not precedent. The distinction between license tax and business tax is one of condition of payment: the distinction between license fee and license tax is one of benefit and cost.

There is, therefore, some truth at the basis of the distinction drawn by the American judges between the police power and the taxing power; but it is to be understood in a quite different sense from that usually adopted. The distinction is really one between a license fee and a license tax, on the one hand, and between a license tax and a business tax, on the other. It is not a distinction between police power and taxing power, because a fee, as we know, may be equally an exercise of the taxing power, understood in the broad scientific sense; while a tax is none the less a tax because it is a regulation. When the American judges hold that a license fee must "not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business," † they are drawing the line between license fees and license taxes, although legal complications may compel them to assert that it is a distinction between the police power and the taxing power. For instance, the decision that high liquor licenses are not taxes — a decision absolutely untenable

* This is really the basis of the very recent decision of the United States Supreme Court in the case of Harmon *v.* City of Chicago, Supreme Court Reporter, vol. xiii. No. 10, p. 306 (February 13, 1893). A license charge for using the Illinois River is declared to be a tax, and in conflict with the interstate commerce provision of the constitution, because it is not a compensation for any specific improvement. In the latter case it would be a license fee or toll, and perfectly valid, as decided in Huse *v.* Glover, 119 U. S. 543.

† Cooley, *Taxation*, p. 598.

from the standpoint of public finance — is due simply to certain constitutional limitations, and the policy of upholding the payments. Liquor licenses, if high enough, are no less taxes than the Southern license or privilege taxes; and the attempt to call them license fees, in order to uphold them under the police power, is the result of a praiseworthy but palpable legal fiction. To say, as Cooley does, that a high liquor license is only a license fee covering the cost of regulation, because "it is reasonable to take into account all the incidental consequences that may be likely to subject the public to cost" (such as prevention of resulting crime and disorder), is a violent stretching of the term. It is utterly impossible to state how much of pauperism and crime is due to drink and how much to other causes.

The truth which our judges have vaguely grasped, and which they have attempted to realize in their decisions, then, is simply this: a fee is a payment for a service or privilege from which a special measurable benefit is derived, and does normally not exceed the cost of the service; a tax is a payment where the special benefit is merged in the common benefit, or is converted into a burden, not a benefit. But a fee remains a fee, whether levied under the police power or the taxing power; and the tax is no less a tax when classified under the taxing power than when put under the police power.

The characterization of fees, as we have outlined them, will also suffice to solve another problem which has given rise to considerable difficulty. Where shall we class the payments made for certain governmental enterprises, like canals, post-office, telegraph, railroads, etc.? Are they taxes, are they fees, are they compulsory payments at all, or are they not rather to be called prices, and classed with the contractual income of the state?

The solution of the problem is to be found not in the nature of the industry or of the article dealt in, but in the

manner in which the industry is conducted. Some writers say that if the government goes into a public business, like the post-office, the charges are compulsory charges; but that if it goes into a private business, like a shoe factory or the coal supply, the revenue belongs to the industrial domain. This, I conceive, is a decided mistake. There is no such sharp line of demarcation between a naturally public and a naturally private business. Everything depends on the view taken for the time being as to the policy of governmental interference. The post-office is everywhere in the hands of government, simply because the enterprise arose at a time when there was no dispute over the policy. The telegraph, the telephone, and still more the railroad business are public occupations in some countries, private occupations in other countries, because the industries developed after the discussion as to the limits of governmental interference arose. Where shall we put the gas industry, which in some municipalities is a public, and in others a private, business? Where shall we put the water supply and the street railway business? Some countries have a monopoly of salt and tobacco manufacture, and these are then regarded as modes of taxing the people who use salt and tobacco. But would there be any difference in principle if the government went into the coal business or the shoe business, in order to tax the people using coal or shoes? It might indeed be very bad policy for the government to extend its functions; but there is no natural and immutable line of cleavage between a public and a private business, between a monopoly of tobacco and a monopoly of bread or iron. The line is always drawn in accordance with the temporary public feeling and the social policy,—the question as to how far the vital public interests are at stake. But this question has been answered, and will always be answered, differently in different countries and in different ages.

The distinction, therefore, is not one of the nature of the enterprise, as most writers have assumed.* It is rather one of the manner in which the enterprise is conducted. If the governmental enterprise is a competitive one, carried on in open competition with private enterprises, the individual has the choice; and, if he chooses to employ the government agency, he pays a price, just as he would pay a price to the private agency. The income to the government is then clearly a contractual, or *quasi*-private, income. But if the government has an actual or virtual monopoly of the enterprise, it can charge what it will; and the individual has no choice. The payment then is arbitrarily fixed by the government. The government indeed may conduct the monopoly enterprise according to different methods. It may give its services gratuitously, and charge the individual nothing, the expense being defrayed out of the general taxes. It may seek to recoup in part or in whole the cost of the enterprise, and charge each individual in the ratio of the special benefits to him. The payment is then a fee. It may seek to make a monopoly profit out of the enterprise, so that the charge to the individual becomes a distinct burden. The payment is then a tax. But whenever the government makes a monopoly charge,— whether it be a fee or a tax,— it is an arbitrarily fixed or compulsory payment; it is no longer a contract price fixed by the higgling of the market and sold in open competition to the highest bidder. For instance, if the government goes into the coal or the gas business in competition with private companies, and sells coal or gas to any one at wholesale or retail, the payment is a price, a contractual payment, a *quasi*-private income.

*For instance, Wagner classes telegraph and postal charges among fees, railroad charges among industrial revenue. Schall limits fees to services for "essential state purposes" (*wesentliche Staatszwecken*). Compare Schönberg's *Handbuch der politischen Oekonomie*, iii. (3d ed.) p. 98. Roscher, *Finanzwissenschaft*, p. 22; and Vocke, *Die Abgaben, Auflagen, und die Steuer*, pp. 223–565, also except payments for post, telegraph, railroads, etc., from the category of fees.

But, if the government has a monopoly of the gas or water supply, and seeks to defray its outlay by saying that every one with one bath-room or one hose should pay so much, then the individual has to pay whether he uses the water or not, because the government arbitrarily estimates the special benefit to him. The payment is then a fee. Finally, if the government has a monopoly of the water supply or tobacco supply or salt supply, and fixes the charge for the tobacco or salt so as to bring in a large net revenue, the special benefit to the tobacco or salt consumer is converted into a special burden; and the payment is a tax.

The real difference between a price and a fee or tax depends, then, on the fact of monopoly. This holds equally good in a private as in a public business. Although we apply the term "price" to competitive prices as well as to private monopoly charges, yet in the latter case the charge is often popularly spoken of as a tax on the consumer; and, in truth, it has many of the characteristics of a real tax.* If the business is a veritable monopoly, the charge is not only an arbitrary charge, but a compulsory charge. If the monopoly deals with an absolute necessity of life, there can be no question as to the compulsory character of the charge; and even if the monopoly sells conveniences or luxuries, the charge to the consumer is really no less compulsory than the charge levied by government on a tobacco consumer or the farm-owner. The individual might indeed go without his luxuries, but he might equally go without his tobacco to escape the tobacco tax or refrain from buying a farm in order to escape the real estate tax. The compulsory nature of the payment is the same.† The important difference, indeed, between a private and a public monopoly is that in the private monopoly the payment is always a tax, because the monopolist wants to make the greatest possible monopoly profits;

* See above, p. 300. † See below, p. 320.

while, in the case of a public monopoly, the government may be content with covering the whole or a part of the cost of production, or may even give the service gratuitously.*

The matter, therefore, is very simple. The demands made by government for supplying the individual with commodities or services differ in character according to the conditions of competition and the principle of charge. The post-office stamp, like the canal or highway toll, is almost everywhere a fee;† yet the charge might be so high that the special benefit becomes a special burden, and the payments become taxes on communication or transportation. This was very common in former times. Highways were formerly in private hands, and the charge was an extortion levied by the feudal lord. Then the charge became a monopoly tax on transportation, then it

* The attempt of some writers, like Professor Sax (*Grundlegung der theoretischen Staatswirthschaft*, Sect. 74, 75), to construct a separate class of revenues derived from "public enterprises" (*öffentliche Unternehmungen*), like railways, canals, post, telegraph, etc., under the name of "official prices" (*Taxpreise*), and to differentiate these from fees and taxes, is unsuccessful. For Sax himself confesses (*Ibid.*, p. 462) that when these charges are made higher than in ordinary private enterprises the surplus is not distinguishable from an indirect tax. In confessing this, Sax at once abandons the whole contention. For a charge cannot at once be a price different from a tax and a price composed partly of a tax. In other words, Sax virtually grants, although he does not see it, that the criterion is not the character of the enterprise, but the manner in which it is conducted. Sax's discussion really rests on a confusion of thought, although his whole book is devoted to the attempt to show that he alone, among all writers, has the correct idea. Moreover, his distinction between *öffentliche Unternehmung* and *öffentliche Anstalt* is highly overdrawn. Professor Cohn follows Sax, but he comes to grief much earlier; for, while he makes a sharp distinction between prices and taxes, he confesses that the price paid for government tobacco or salt or whiskey is a monopoly tax (*Finanzwissenschaft*, Sect. 95). That is, a price is not a tax, and yet is a tax. It is easy to avoid difficulties in this way.

† Already in 1765 Benjamin Franklin perceived, in part at least, the difference between a fee and a tax. In reply to the question of the parliamentary committee, "Is not the post-office a tax as well as a regulation?" he replied, "No: the money paid for the postage of a letter is not of the nature of a tax: it is merely a *quantum meruit* for a service done." Dowell, *History of Taxation . . . in England*, ii. p. 46. Franklin, however, failed to see that it might become a tax.

became a toll; until to-day the charges have generally disappeared, and the highways are managed on the principle of gratuitous service. The so-called water rent in New York City is a fee, while the water rate in the English cities is a tax, because in New York it is assessed according to special benefit, while in England it is assessed on the basis of ability as measured by the general local tax, and not in ratio of special benefits. Some of the charges made on the French state railway are prices, because they are fixed in competition with certain private roads. The charges made on the German railroads are not contractual, but compulsory payments, because there is a monopoly: they are compulsory not in the sense that every one is compelled to use the railway, but compulsory in the same sense that a whiskey tax or property tax is a compulsory payment,— *i.e.*, whoever uses the road or drinks whiskey or has property is compelled to pay an arbitrary sum fixed by the government. In short, just as a fee may on the one hand become a tax, so on the other hand it may become a price. The payment for the same service may be a price in one State, a fee in a second, and a tax in a third. Whether a given payment is a price, a fee, or a tax, depends not on the nature of the enterprise, but on the conditions attending its operation. But this does not in the least weaken the essential distinction between contractual and compulsory payments on the one hand, and between fees and taxes on the other. To put fees, when paid for governmental agencies, under the head of *quasi*-private or industrial income,* is plainly an error. A fee is never a contractual payment.

It seems, then, that writers like Professor Bastable, who desire to discard fees as a source of revenue co-ordinate with taxes, are taking a step backwards, and are abandoning a distinction already drawn by Adam Smith. The differences of opinion among recent German, Italian, and

* Bastable (*Public Finance*, pp. 147, 221) commits this error.

Dutch writers as to the scientific content of the conception are due to a lack of rigorous analysis. I venture to hope that the above discussion will clarify the conception, and produce a greater harmony of views.

But, whatever may be the result, it is useless to oppose the creation of any class of revenues co-ordinate with taxes; for, even if we utterly disregard fees, we cannot shut our eyes, as most writers have done, to the existence of another important class of compulsory revenues which yet are not taxes. This final class of public revenues are known as special assessments. Let us see what they are.

III.

It has already been pointed out that classification of public revenues has depended upon historical conditions. Special assessments are a comparatively modern and a specifically American development, although the germ of the system may already be found in the Roman edict, *Construat vias publicas unusquisque secundum propriam domum.** We find no mention of them at all in the earlier books on public finance. In France and England special assessments have been so rarely used as to escape detection, although of recent years the policy of introducing the principle of the "betterment tax" has begun to be discussed in England.† Leroy-Beaulieu, even in his last edition, and Bastable ignore them completely. In Belgium and Germany they have been introduced in the past few decades, and we do find them mentioned in the latter

* Quoted in entirely another connection by Sax, *Die Verkehrsmittel in Volks- und Staatswirthschaft*, i. p. 186.

† Compare Rae, "The Betterment Tax," *Contemporary Review*, 1890, and other articles on the same subject. In France the law of authorization may be traced back to 1807, known as the law on "l'indemnité pour payement de plus-value." But only about twenty to twenty-five cases of application are known. Compare Aucoc, *Droit Administratif*, ii. p. 732 *et seq.*

country under the head of *Beiträge.** But we nowhere find any adequate discussion of special assessments in theory or practice, nor any successful attempt to correlate them with other forms of compulsory contributions.

Yet no American who treats of public finance as a whole can fail to have been struck with the importance of special assessments in actual practice. To take only two examples: in New York City, in 1891, special assessments yielded over $2,400,000: while in Chicago, in 1890, special assessments yielded $4,893,000 as against $6,404,000 raised by taxes.† The courts have been filled with litigation respecting special assessments, and certain valuable principles have been slowly evolved. Yet no one has ever attempted to construct a theory of special assessments, or to assign them to their proper place in the list of public revenues, simply because we have not yet had a single comprehensive American work on the science of finance. Thus the theory of special assessments has not been worked out in Europe, because the facts were not deemed sufficiently important; and the theory has not been worked out in America, because we have had no theorists in public finance.‡

*In Prussia they are legally known as *Interessentenzuschüsse*. Compare Leidig, *Preussisches Stadtrecht*, p. 375. Other forms of special assessments are known as *Deichbeiträge*, and in Baden as *Soziallasten*. The whole system seem to have received a greater development in Belgium than anywhere else in Europe, and yet it has not been noticed at all. The Belgian, Denis, does not mention it in his recent work, *L'Impôt*. The details of the system may, however, be found in Leeman's *Des Impositions Communales en Belgique*, 2d ed., chaps. v.–x. He calls them *taxes*, but confuses them continually with taxes proper, including special taxes.

† These figures are taken not from the United States census, but from the report of the comptroller of the city of New York and from the finance accounts of Chicago.

‡ I have induced one of my students, Mr. Victor Rosewater, to choose the topic of Special Assessments for his doctor's dissertation. The monograph will be completed in the course of the year, and will appear in the *Columbia College Studies in History, Economics, and Public Law* as Vol. II., No. 3. It will contain a comprehensive treatment of the whole subject, historical, legal, statistical, and theoretical.

A special assessment may be defined as a compulsory contribution to defray the cost of a specific improvement to property undertaken in the public interest, and levied in proportion to the special benefits derived. When a new street is opened, for instance, it is deemed equitable that the expense should not be entirely borne by the whole community, but that it should be defrayed in part or in whole by the abutting real estate owners, whose property receives an undeniable special benefit in the immediate enhancement of value. The advantages of the particular government services accrue in great part to the property owners: it is right that they should bear the burden in the ratio of these advantages. Without going into the history in this place, we may say that the system, beginning in New York in the seventeenth century, has been well-nigh universally adopted in the United States, and that its operation extends to the improvements like the following: the opening, laying out, grading, paving and repaving, planking and curbing the streets; sprinkling them with water, illuminating them with gas and electric light, and even ornamenting them with shade-trees; constructing drains, sewers, levees, and embankments; laying wire conduits and water pipes; bettering water-ways and dredging rivers; laying out and developing public parks, squares and drives. In all these cases the entire expense, or a certain portion of it, is met not by general taxes, but by special assessments. What interests us here is not the description or statistics, but the theory of special assessments.

In the first place, special assessments are an exercise of the taxing power. In the early days various attempts were made to justify special assessments under the power of eminent domain and under the police power. But a leading New York case* in 1851 swept away all these

*People *v.* Brooklyn, 4 N. Y. 419. Some of Judge Ruggles's *obiter dicta* on the principles of taxation are open to very serious question. But as they have really nothing to do with the point decided in the case, we pass them by.

refinements, and decided that special assessments were a constitutional exercise of the taxing power. The whole development in this country has since proceeded on that assumption. The reasoning of Judge Ruggles in that case is so convincing as to need no comment or defence.

Thus the element of public purpose must always be present. It forms an essential part of the definition. A special assessment levied solely for private purpose would be a confiscation, not an exercise of the taxing power. Again, a special assessment must be capable of apportionment: there must be an assessment district, and the assessment must not be arbitrary. Any text-book on the law of special assessments contains countless cases which enforce these points. Special assessments, in short, like fees, are an exercise of the taxing power.

But special assessments, like fees, are not taxes in the ordinary or narrower sense. Taxes, as we know, are compulsory contributions levied to defray the expenses incurred in the common interest, without any reference to particular advantages accruing to the tax-payer. But in special assessments, as in fees, the service for which the expenses are incurred redound to the particular benefit of the individual. The primary test of a tax is common burden: the primary test of a special assessment is special benefit. From this one great distinction all the others flow. They may be summed up as follows: —

First. In a special assessment the special benefit to the individual is measurable. In a tax the special benefit does not exist, or, if it exists at all, it results incidentally from the individual's share in the common benefit: it is not separately measurable. No one, perhaps, will be apt to confound a special assessment with a general tax; but the line of distinction is equally clear between a special assessment and a special tax. The English local taxes for sewer rates, *e.g.*, might seem to be in no wise distinguishable from the American sewer assessments. Some of our

judges, including Judge Cooley, have been led astray by the resemblance.* Yet the English payment is nothing but a special tax, while the American payment is a special assessment. For it is a clear principle of the English system that "the exact measure of the benefit is not the measure of the liability to be taxed," † while the reverse is true in the American system of special assessments. In other words, the test of the special assessment is measurable special benefit: the test of the special tax is not measurable special benefit, but special taxable capacity or faculty, just as the test of the general tax is general taxable capacity or faculty. The distinction could not be clearer. It holds equally good when applied to the special taxes for particular local purposes levied in New Jersey and other American commonwealths as compared with special assessments levied in the same places. And yet the few writers who have spoken of special taxes at all have almost universally confused them with special assessments.‡

Secondly. Taxes may be proportional to property or to income or to expense or to any other test of faculty, or they may be progressive rather than proportional. Special assessments can never be progressive, and must always be proportional to benefits. This is the universally recognized principle in our American jurisprudence; and the whole contest has narrowed itself down to the question as to what is to be regarded as the most equitable standard of benefit. Acreage, frontage, value, superficial area of the property,—all these have been upheld as proper methods of apportionment, and as constitutional

* Cooley, *Taxation*, chap. xx.

† *Report of the Poor Law Commissioners on Local Taxation*, 1844, pp. 43, 65. See also the decisions quoted above, p. 299.

‡ This is true of Professors Neumann and Wagner. Professor Bastable has escaped the confusion only by ignoring both classes, although he does barely mention in one place "the 'betterment' principle" as justification for "local taxes." Cf. *Public Finance*, p. 366.

tests of presumptive special benefit. But not only are special assessments void when there is no special benefit, they are also voidable when the charge exceeds the special benefit.* To charge more than the exact benefit would be tantamount to taking private property without due compensation. In the special assessment there must be a compensation: in the tax there is no question of compensation. The only disputed question in the American courts is whether the special benefit must be actual or whether it may be presumptive. The general tendency of the decisions is to make the legislative and administrative discretion rather wide.†

Thirdly. Special assessments are confined to specific local improvements, while the sphere within which taxes operate is in this respect unlimited.

Fourthly. In the special assessments the government performs a definite, particular act in return. It is a question of service and counter-service, of give and take. In the tax the government does not pledge itself to do a particular thing for the particular individual in return. The reasoning is precisely the same as that adduced above in discussing the distinction between special taxes and fees. A special assessment is in this respect on exactly the same footing as a fee.

The distinction between special assessments and taxes has been widely recognized in American jurisprudence. The constitutional limitations applied to taxation have generally been declared inapplicable to special assessments. As Cooley puts it, "The overwhelming weight of authority is in favor of the position that all such provisions for equality and uniformity in taxation by value have no application to special assessments." Exemptions from taxation do not imply exemptions from special assess-

* *Cf.* the celebrated Agens cases in New Jersey. State *v.* Newark, 37 N. J. L. 415; Bogert *v.* Elizabeth, 27 N. J. Eq. 508.

† *Cf.* Matter of Church, 92 N. Y. 6; Allen *v.* Drew, 44 Vt., 174; and other cases cited in Cooley, *Taxation*.

ments. Special assessments are none the less a distinct class because in some laws they are called taxes. In some cases, in their anxiety to uphold the distinction, the same courts interpret the word "assessment" in the phrase "uniform rate of assessment and taxation" sometimes one way, sometimes the other. That is, when special assessments must be put under the taxing power in order to be upheld, "assessment" is held to be used in the general sense, and to mean taxation; when in other cases special assessments can be upheld only by being distinguished from taxes, "assessment" is held to be used in the technical sense, and to mean something different from taxation. All the ingenuity of the American judges has been needed to attain the result now achieved,— the marked distinction between special assessments and taxes.* But their efforts have been sensible, and the result is in accord with the teaching of the science of finance.

Special assessments hence are not taxes. But, as we have seen, they differ from taxes in the same sense that fees differ from taxes, in that both fees and special assess-

*One recent case, to which my attention has been called by Mr. Rosewater, is especially noteworthy as illustrative of ingenious distinction. The general trend of authority, as we have shown, is to give a wide discretion, and uphold assessments per front foot as a good presumptive test of special benefit. Yet in the celebrated Illinois case of Chicago *v.* Larned, 34 Ill. 203 (decided in 1864), the court held that the provisions of the constitution as to uniformity and equality of taxation were unusually stringent, and were applicable to special assessments also. The court was really mistaken here, as the Illinois constitution did not differ from many others where the contrary interpretation was adopted. Still, as a consequence of their view, assessments could be made on each lot only up to benefit actually proven, while the remainder of the cost would have to be defrayed by general taxes. Assessment by front foot was held to be invalid. Yet later on the courts evaded this case by a very fine distinction. The constitution of 1870 gave local authorities the right to levy "special taxes for local improvement." In White *v.* People, 94 Ill. 613, the court held that a special tax was not a special assessment, and that a special tax might exceed the actual benefits to the particular lot. An assessment by front foot is hence valid, and the system in Illinois to-day is the same as in other States. Of course the "special tax" of the Illinois constitution is simply the "special assessment" of other States, and is even known by the latter name in Illinois itself. There is a distinction between a special tax and a special assessment, as we have seen; but it is not the distinction drawn by the Illinois court.

ments rest on the doctrine of equivalents. Fees, special assessments, and taxes all have points in common in that they are all manifestations of the taxing power. Fees and special assessments have additional points in common, which they both possess in contradistinction to taxes. But, finally, fees and special assessments differ from each other. We have distinguished special assessments from taxes: it remains to distinguish special assessments from fees.

In the first place, special assessments are levied only for specific local improvements: fees may be levied for any services. The field of operation of special assessments is restricted: that of fees is unrestricted.

Secondly, special assessments are paid once and for all: fees are paid periodically, according to each successive service. The only qualifications to this statement are that special assessments may, in a few cases, be spread over a longer period, and may then be payable by regular installments; while, on the other hand, a fee is of course paid only once when the service is demanded only once, as in the case of a marriage fee. But that does not invalidate the distinction. In the special assessment the payment is, so to speak, capitalized in a lump sum, payable generally at once, but occasionally by installments. In the fee, on the other hand, the payment is, so to speak, fragmentary and irregular. There may be a question as to a choice of methods. For instance, in constructing a bridge, the cost may be defrayed either by levying a special assessment on the abutting property owners or by charging tolls on the people who use the bridge; and these are presumably in great part also the abutting property owners or their friends and dependents. If the benefits redound in greater part to these property owners, the charge ought to be a special assessment; if the benefits redound in greater part to the individuals who are not the property owners, the charge ought to be a fee

(toll); if the benefits are so wide-spread that the whole community at large is almost equally interested in it, the charge ought to be neither a special assessment nor a fee, but a tax on the general tax-payer.

Thirdly, a fee is levied on an individual as such: a special assessment is levied on an individual as a member of a class. That is, in the case of special assessments there must always be an assessment area upon which the whole assessment is levied, to be then further distributed according to a definite rule of apportionment. It is a settled rule of the American law, for instance, that in assessing benefits the assessors cannot restrict themselves to the cost of the improvement in front of a particular lot.* In the fee, on the other hand, the government looks not to the class or the area, but to the separate individuals.

Fourthly, a special assessment must always involve a benefit to real estate: a fee is paid for a service which may benefit other elements than real estate, such as personal property, or other attributes of the individual without reference to property at all.

There is one further distinction, which, however, is more imaginary than real. It might be maintained that special assessments are like direct taxes, and fees like indirect taxes, because the former are compulsory and the latter are voluntary. But this distinction is very badly expressed, and, as it reads, untenable. For, notwithstanding the contrary statement, which has frequently been made, indirect taxes are not a whit more voluntary than direct taxes. It is true that, if a man chooses to go without tobacco, he may escape the tobacco tax; but it is equally true that, if a man chooses to go without land, he may escape the land tax; or, if he chooses to go without certain kinds of property or income, he may escape to that extent the property tax or the income tax. Indirect as well as direct taxes are compulsory, not voluntary contri-

* *Ex parte* Mayor of Albany, 23 Wend. 277.

butions. So, in the same way, there is no truth in the statement that a fee is voluntary and a special assessment compulsory. It is true that I do not need to pay a pedler's license fee if I do not care to peddle; but, on the other hand, I do not need to pay a special assessment if I do not care to own the land. And, when the payment of a fee is connected with necessary every-day transactions, like mortgage registration fees or marriage fees, there can be no question of the compulsory nature of the transaction. Birth and death cannot well be termed voluntary actions; and yet a registration fee for a birth or death certificate does not differ in character from any other fee. Fees like special assessments, indirect like direct taxes, are all compulsory contributions.*

It is clear, however, that there is a sharp line of distinction between fees and special assessments, as there is between special assessments and taxes. There is no danger of confusing them in practice. The only remarkable fact is that so little should yet have been done to differentiate them in theory. Even Professor Wagner in the last edition of his work is compelled to recognize the existence of "*Beiträge*," but mentions them in a few lines as an addendum to fees, entirely ignoring the marked points of difference. Of course, it would be easy to follow Professor Bastable's example, and deny the existence of fees at all as a separate class, in order to avoid the "creation of a distinct group of state receipts co-ordinate with that derived from taxation." † But, when confronted with the undeniable existence of special assessments, even he will have to revise his classification, and create at least one "distinct group co-ordinate with" taxes. And, if this one group is separated from taxes, it will be difficult to refuse

* Neumann, who is the only writer to attempt a distinction between fees and special assessments, makes it turn on a very dubious distinction between direct and indirect taxes. *Die Steuer und das öffentliche Interesse*, pp. 327, 334.

† *Public Finance*, p. 221.

to cut off another group, for the arguments that apply in the one case apply equally well in the other.

To sum up the preceding discussion, we find that under actual conditions all public revenues are either gratuitous, contractual, or compulsory contributions; that the compulsory contributions are levied in virtue of the power of eminent domain, the penal power (either as a separate power or as the fiscally important part of the police power), or the taxing power; and, finally, that the taxing power manifests itself in the threefold form of special assessments, fees, and taxes. We should then have this table: —

Revenues	Gratuitous		Gifts
	Contractual	Public Property and Industry	Prices
	Compulsory	Eminent Domain	Expropriation
		Penal Power	Fines and Penalties
		Taxing Power	Special Assessments, Fees, Taxes

I would offer in conclusion the following definitions: —

A Special Assessment is a compulsory contribution paid once and for all to defray the cost of a specific improvement to property undertaken in the public interest, and levied by the government in proportion to the special benefits accruing to the property owner.

A Fee is a compulsory contribution to defray the total or partial cost of each recurring service undertaken by the government in the public interest, but conferring a special advantage on the fee-payer.

A Tax is a compulsory contribution from the individual or association to cover the expenses incurred by the government in the common interest, without reference to special benefits conferred.

EDWIN R. A. SELIGMAN.